Supreme Court, U. S.
FILED
SEP 8 1975
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-3651

WALTER E. WINKELMAN and PAUL F. BECKER,
Petitioners,

v.

BLYTH & CO., INC., A Delaware corporation,
Respondent.

ELMER G. ANDERSON and VICTORIA G. ANDERSON, HUSBAND AND WIFE, THELMA SCOTT WOOD, MAURICE J. SCOTT and MARGARET M. SCOTT, husband and wife, ABBOTT W. LAWRENCE and EDITH R. LAWRENCE, husband and wife,
Petitioners,

v.

BLYTH EASTMAN DILLON & CO., (BLYTH & CO., INC.), a Delaware corporation, THOMAS MORRIS and JOHN VAN LANINGHAM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners in two cases consolidated below respectfully petition for a writ of certiorari.

In Winkelman & Becker v. Blyth, No. 73-3091, the plaintiffs sought to bring a Rule 23 class action under Rule 10b-5 of the Securities Exchange Act of 1934 in behalf of approximately 200 victims of securities fraud to whom Blyth & Co. sold shares of ASECO, Inc.

This case was consolidated below with Anderson et al. v. Blyth, Eastman Dillon & Co. (Blyth & Co., Inc.) et al., No. 73-3090, wherein seven plaintiffs complain of the sale to them by Blyth of ASECO shares.

The District Court entered summary judgments against the plaintiffs and the members of the proposed class on the issue of limitations, and the summary judgments were affirmed by the Court of Appeals.

There is a conflict between the circuits over how the federal equitable tolling doctrine should be applied to a limitations period taken from state law in a securities fraud case brought under Rule 10B-5, for which there is no federal limitations statute.

There is also conflict between the circuits as to the appropriateness of class action treatment under Rule 23.

OPINIONS BELOW

The June 10, 1975 Opinion of the Court of Appeals for the Ninth Circuit is reported Walter E. Winkelman & Paul F. Becker v. Blyth & Co., Inc., ____ F.2d _____(1975), Appendix page A-1.

The unreported Opinion and Order allowing summary judgment entered by the United States District Court for the District of Oregon August 31, 1973 is reproduced in the Appendix p. A-4. *

The Order denying class action treatment of Winkelman & Becker v. Blyth & Co., Inc., entered December 21, 1972, is set out in the Appendix, p. A-13.

The judgment of the United States Court of Appeals for the Ninth Circuit to be reviewed was entered June 10, 1975. Petition for Rehearing was denied July 11, 1975.

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* Less than 60 days after deciding summarily August 31, 1973 that the Statute of Limitations had run against the actions here, the District Court reversed its view and decided the same issue favorably to other victims in Breedlove v. Blyth, Civil No. 72-247(October 24, 1973). This unreported decision is reproduced in the Appendix p. A-9.

JURISDICTION

Title 28 USC 1254 (1) as revised by the Act of June 25, 1948, ch. 646 (62 Stat. 928) is believed to confer on the Supreme Court of the United States jurisdiction in its discretion to review these cases by writ of certiorari.

The United States Court of Appeals had appellate jurisdiction under 28 USC Sec. 1291.

The United States District Court had jurisdiction under Section 22 of the Securities Act of 1933 (Title 15 USC Sec. 77 b) of plaintiffs' action brought under Section 17 (a) of said Act (15 USC 77q). The court had jurisdiction under Section 27 of the Securities Exchange Act of 1934 (Title 15 USC 78aa) of plaintiffs' causes of action under Section 10(b) of said Act (15 USC 78 jb) and Rule 10b-5 thereunder (17 CFR 240.10b-5).

QUESTIONS PRESENTED

First, after a broker-dealer has sold stock with predictions of price increases, does publication of bad news about the company's business and a sharp decline in price of the stock impute to the purchasers knowledge of fraud on the part of the broker-dealer and start the limitations period running automatically as a matter of law against all charges of securities law violation which plaintiffs may discover later?

This question has three aspects:
a) Is the plaintiff's diligence in discovering the alleged securities fraud to be measured according to "the peculiar circumstances

of each case, including existence of a fiduciary relationship, concealment of the fraud, opportunity to detect it, position in the industry, sophistication and expertise in the financial community and knowledge of related proceedings" (1) or must every plaintiff measure up to the objective standard of the theoretical "prudent man"?

The Ninth Circuit's decision for which review is sought imposes automatically on every plaintiff, regardless of the circumstances which delayed his discovery of the fraud charged, the standard of diligence which the theoretical "prudent man" might achieve. This contradicts the interpretation of the federal tolling doctrine made by the Third and Tenth Circuits. The decision misinterprets Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2d Cir. 1970).

b) In a situation where the Statute of Limitations would be a bar to one violation of the securities laws, would the plaintiff be entitled to recover on some other violation which he was not in position to detect before the critical date? The Ninth Circuit's decision here says "No", contrary to pronouncements of the Second and Fourth circuits.

c) Does the timeliness of plaintiffs' filing their case present an issue of fact to be decided by a jury or the trier of the case,

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1/ Tobacco & Allied Stocks, Inc. v. Transamerica Corp., D. Del. 143 F. Supp. 323, 331 (1956) aff'd. 244 F.2d 902 (3rd Cir.) quoted with approval in deHaas v. Empire Petroleum Company, 435 F.2d 1223, 1226 (10th Cir. 1970).

or is it a matter of law appropriate for summary judgment? The decision here contradicts the generally accepted practice.

Second: Do a stock broker's fraudulent conspiracy and concealment of material facts present a predominant common issue of liability under Rule 23, Federal Rules of Civil Procedure, which should entitle the case to class action treatment?

Here, the decision to be reviewed denied class action treatment on the ground that the basis of the alleged fraud was non-standard oral misrepresentations. The decision ignores alleged violations which had nothing to do with oral misrepresentations: Blyth's conspiracy with Hugh Pike and Hinton-Jones Company to inflate the market price of stock of a small company where only a small volume was available for trading; concealment by Blyth of its role as a market maker in ASECO stock; the practice of employing deceptive confirmation slips which omitted and concealed material facts such as Blyth's profit spread or mark-up or commission.

STATUTES AND RULES

We have set forth in the Appendix the pertinent portions of the following statutes: Securities Exchange Act of 1934, Section 10(b), 15 USC 78 j.b. A-14; Rule 10b-5, 17 C.F.R. 240.10b-5 A-14; ORS 12.010 and 12.110 (1) A-15; Rule 23, Federal Rules of Civil Procedure A-16; Rule 56 Federal Rules of Civil Procedure, A-18; Oregon Revised Statutes ORS 59.135 and ORS 59.115.5 A-21.

STATEMENT OF THE CASE

The plaintiffs' causes of action are based upon fraudulent conspiracy and concealment of material facts by a broker-dealer who acted as their investment adviser in a relationship of trust and confidence. R 137. The plaintiffs complain that Blyth entered into a conspiracy initiated by one Hugh Pike and Hinton-Jones Co. to inflate artificially the market price of stock of a small company, ASECO, Inc., where only a small volume was available for trading. R 8, 137. Plaintiffs complain of Blyth's nondisclosure of material facts in printed confirmation slips, which were uniform as to all victims. R 4. These do not constitute oral misrepresentations made to individuals. Blyth, the broker-dealer, did not disclose that it was a market maker in ASECO shares. R 140.

The District Court for the District of Oregon misinterpreted the plaintiffs' complaints and treated them as though the only violations complained of were oral misrepresentations by the broker-dealer that ASECO would increase in price. A-5, A-8. The District Court's opinion was adopted by the Court of Appeals. Ap A-2.

The letter written June 12, 1969 by ASECO to its stockholders, A-22, contains nothing to alert the victims as to Blyth's violations. No inference can be drawn from the letter. Blyth concealed its role as a market maker; that while acting as agent for the plaintiffs Blyth had entered into a conspiracy with Hugh Pike and Hinton-Jones Co. to manipulate the market price of ASECO in a thin float situation. The mere decline in price of ASECO shares gave no least indication of Blyth's violations.

The June 12, 1969 letter from ASECO's management to its stockholders contained good news about the company as well as bad. It reported that sales for the year ended February 28, 1969 were in excess of $14 million, compared with earnings of $140,000 plus for the prior year. Earnings were $1.70 per share for 1969 and .59¢ for 1968. There was a working capital deficit of $900,000, but the company took action to raise $700,000 and $1 million from private investors. R 183. See letter of June 12, 1969, Appendix p. 22.

Yet it was held below that this letter of June 12, 1969, as a matter of law, gave to plaintiffs imputed knowledge of Blyth's violations alleged in their complaints, so that they were time barred two years thereafter. The letter is the basis for the summary judgments entered against the plaintiffs.

The affidavits of Winkelman and Becker, the depositions of Lawrence and Scott, and the verified complaints of the plaintiffs raised genuine issues as to plaintiffs' inability to discover more than a short time before the filing of their cases the violations of the securities acts which are grounds for plaintiffs to recover against Blyth. The record shows that plaintiffs brought their cases within two years from the time they became aware of Blyth's violations.

Mr. Becker, 80 years of age, was seriously ill in June of 1969. He did not receive the June 12 letter. He did not learn that ASECO was in trouble until January of 1972, after which he timely filed his case, R 244.

Mr. Anderson and his wife averred that neither of them discovered and could not reasonably have discovered before Feb. 1972 Blyth's concealments of material fact and participation in a conspiracy to manipulate ASECO shares. R 144-147.

Mr. Lawrence's deposition taken after his case was filed shows that he knew nothing about stocks, relied upon the broker's representations as an investment adviser. He did not learn of Blyth's violations until his deposition was taken in a different case brought by another victim in the fall of 1972. Mr. Lawrence retired in 1969 and has been away from the city most of the time since. Deposition filed June 29, 1973, R Index p. 2.

Mr. Scott gave his deposition after filing his case. When he was shown the letter of June 12, 1969, he testified: "I never received it; I never read it. I don't believe I ever received this piece of literature." Dep. p. 47.

Blyth was a market maker*, for Blyth purchased for resale between October 3, 1968 and June 4, 1969, 25,860 shares of ASECO and resold between October 3, 1968 and June 4, 1969 some 19,347 shares of ASECO for about $1,112,866.00 in some 200 sales transactions.

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*/ Market making is discussed in Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2d Cir. 1971); SEA Release No. 4593, April 10, 1951; Cant v. A.G. Becker & Co., CCH Fed. Sec. L. Rep. Par. 93,347 (N.D. Ill. E.D. 1971); Black v. Shearson, Hammill & Co., CCH Fed. Sec. L. Rep. Par. 92,528 (Calif. Ct. of Appeals 1st Dist. Civil No. 24234, Oct. 3, 1968); Reyos v. United States, aff'd sub nom. Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

REASONS FOR GRANTING THE WRIT

There is conflict in the decisions of the United States courts of appeal. The decision under review is contrary to the pronouncements of the Supreme Court of the United States.

THE ESTABLISHED FEDERAL EQUITABLE TOLLING DOCTRINE SHOULD BE APPLIED IN DETERMINING WHEN THE STATUTE OF LIMITATIONS COMMENCES TO RUN

The running of a time period taken from a state statute of limitations in a federally created cause of action under Rule 10B-5 should be determined according to the established federal tolling doctrine and policy, rather than a borrowed state policy. Holmberg v. Armbrecht, 327 U.S. 392 (1946); Movie Color Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961).

Although the limitation period is supplied by state law, "it is a matter of federal law as to the circumstances that will toll a state statute applied to private actions under the securities laws." Esplin v. Hirschi, 402 F.2d 94, 103(10th Cir. 1968).

The federal doctrine of tolling was pronounced by the Supreme Court in the early case of Bailey v. Glover, 88 U.S. 342 (1875): "(W)here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances

or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." "This equitable doctrine has been consistently applied in private fraud actions under section 10(b) of the Securities Exchange Act." deHaas v. Empire Petroleum Company, 435 F.2d 1223, 1226 (10th Cir. 1970), citing Esplin at page 103; Hooper v. Mountain States Securities Corp., 282 F.2d 195 at 206 (5th Cir. 1960).

"Thus, the duty of reasonable diligence is an obligation imposed by law solely under the peculiar circumstances of each case, including existence of a fiduciary relationship, concealment of the fraud, opportunity to detect it, position in the industry, sophistication and expertise in the financial community, and knowledge of related proceedings." Tobacco & Allied Stocks, Inc. v. Transamerica Corp., D.Del. 143 F. Supp. 323, 331, (1956) aff'd 244 F.2d 902 (3rd Cir.), quoted with approval in deHaas, 435 F.2d at 1226, (10th Cir. 1970).

The decision here contradicts this principle. It makes no allowance for the circumstances which made the plaintiffs slow to suspect that they had been victims of securities fraud. The record shows that these unsophisticated investors, most of them elderly, believed strongly that Blyth's sales representative was watching out for their interests (Deposition of Lawrence p. 15) Deposition of M. J. Scott p. 52). To people with a deep faith in their broker-dealer, news of the decline in price of ASECO shares meant that Blyth had been honestly mistaken in its predictions of gains, at worst inefficient, but not fraudulent. They had no opportunity to detect Blyth's violations of the securities laws until they heard long afterwards about litigation brought

against Blyth by better informed persons. Affidavit of Becker R 244; affidavit of Winkelman R 242; deposition of Lawrence pp. 62-65; Deposition of M. J. Scott p. 59, 60, 67, 76.

The ruling of the court below time bars automatically and mechanically each of the violations alleged by plaintiffs. The court below followed Turner v. Lundquist, 377 F.2d 44, 48 (9th Cir. 1967), which originates in California. The court below applied the constructive or imputed knowledge doctrine instead of the federal tolling doctrine.

The constructive notice doctrine stems from Section 19 of the California Civil Code, which provides:

> "Every person who has actual knowledge of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact in all cases in which by prosecuting such inquiry he might have learned such fact."

Here, the Ninth Circuit affirmed the view of the District Court which held that:

> "The knowledge had by or imputed to the plaintiffs from the June 12, 1960 letter to the stockholders compels the conclusion that a prudent man would have suspected the alleged fraud. There is no genuine issue as to this material fact. I conclude that plaintiffs

had two years from June 12, 1969 in which to file their claims under Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5, Section 17(a) of the Securities Act of 1933..."

Under federal policy the limitations period would not begin to run against the plaintiffs until some further event beyond learning of ASECO's business decline in the June 1969 letter should reveal to the plaintiffs that a cause of action existed against Blyth. This did not occur until the plaintiffs actually learned of cases brought against Blyth by other victims. Plaintiffs filed their cases timely thereafter.

The excerpt quoted from Chasins in the Court of Appeals' Opinion, explains why concealment of market making by a seller is a violation of the Act which vitiates the transaction. Chasins did not involve any statute of limitations question, and it does not follow from Chasins that a drop in market price after a strong recommendation to buy would put the buyer on notice that the recommendation had been fraudulent. Nor would this give constructive notice that the seller had been concealing its having engaged in market making activity in the stock recommended.

Here, where there is fraud by a fiduciary, the defendant's original fraud is regarded as a continuing affirmative act, and mere silence of the defendant is treated as a concealment which would toll the statute of limitations. Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, cert den. 394 U.S. 987; Burns v. Mass. Institute of Technology, 394 F.2d 416 (CA Mass. 1968); Janigan v. Taylor, 344 F.2d 781, cert. den. 382 U.S. 879 (CA Mass. 1965).

Whereas here, the plaintiffs are unsophisticated investors whose lack of knowledge about the stock market makes them dependent upon the superior knowledge of a trusted securities salesman for investment advice, the mere possession of confirmation slips which plaintiffs were not competent to interpret would not be deemed to put them on notice of fraud until the fraud was revealed to them by an adviser competent to comprehend the fraud.

The facts available at the most would put only a sophisticate on inquiry so as to lead to actual knowledge of the violation. For example, in Weiser v. Schwartz, 286 F.Supp 389 (E.D. La. 1968), (a churning case) where the plaintiff knew only that he had lost money until his attorney had the account audited and revealed the fraud, the statute was held not to have run against the cause of action, for the confirmation slips and statements furnished him by the defendants did not provide him with notice of the facts which, in the exercise of due diligence would have led to actual knowledge of the violation. 286 F.Supp at 393. The court followed the 1968 decision of the District Court in Hecht v. Harris, Upham & Co., 283 F.Supp. 417, subsequently affirmed by the Ninth Circuit, 430 F.2d 1202, 1210 (1970).

THE LETTER OF JUNE 12, 1969 DID NOT SET THE LIMITATIONS PERIOD RUNNING AS TO VIOLATIONS ALLEGED AS GROUNDS FOR RECOVERY BY PLAINTIFFS.

Neither anything in the letter of July 12, 1961 nor the decline in price of ASECO shares would alert anyone to suspect any of the following violations alleged by

plaintiffs: a) that Blyth had conspired with Hinton-Jones & Co. to manipulate the price of ASECO shares in violation of Rule 10b-5-(1); b) that while acting in a fiduciary capacity as an investment adviser to plaintiffs, Blyth had concealed from them its role as a market maker (Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2d Cir. 1971) 10b5-(2), c) that Blyth had engaged in a course of business and practice of using deceptive confirmation slips, which would operate as a fraud or deceit on any person, in violation of Rule 10b-5 (3).

The decision below conflicts with that of the Second Circuit, in Schillner et al. v. H. Vaughan Clarke & Co., 134 F.2d 875, 878, 879, (2d Cir. 1943) that where the Statute of Limitations would be a bar as to one misrepresentation, "this would not preclude recovery on the ground of some other untruth or material omission which reasonable diligence would not have discovered before the critical date." The Fourth Circuit is in accord. White v. Federal Deposit Ins. Corp., 122 F.2d 770, 776. See also Wood v. Baker, 217 Or 279 (1929).

GENUINE ISSUES OF FACT AS TO TIMELINESS OF PLAINTIFFS' FILING MADE SUMMARY JUDGMENT INAPPROPRIATE.

Although the showing made by plaintiffs in the record raised genuine issues of material fact as to the timeliness of their complaints, the Court of Appeals affirmed the summary judgment that they were barred automatically two years after ASECO's letter of June 12, 1969 triggered the Statute of Limitations. The presence of genuine issues of fact as to when the plaintiffs ought to have discovered their causes of action renders the cases inappropriate

for summary disposal. Batchelor v. Legg & Co., 55 FRD 557 (DC Md. 1972); Johns Hopkins University v. Hutton, 422 F.2d1124, 1131 (4th Cir. 1970); United States v. Diebold, 369 U.S. 654-655 (1952).

WHERE THE RECORD DOES NOT SUPPORT THE COURT'S REASON FOR DENYING CLASS ACTION, RULE 23 TREATMENT SHOULD BE ALLOWED.

If the federal tolling doctrine is properly applied here, the statute of limitations would not operate as a bar in Winkelman to the estimated 200 members of the class. (R 3).

As to this class, it can be seen from the complaint (R 1) that no disconnected oral representations are claimed under clause (2) of Rule 10b-5. Instead, Blyth's concealment and non-disclosure of its role as a market maker (R 4) and of its spread or mark-up (R 5) are violations under clause (2) of the Rule which establish liability common to all members of the class.

Moreover, it is clear that the charge of conspiracy to defraud by manipulating the shares in concert with Hugh Pike and Hinton-Jones & Co., brought under clause (1) of the Rule, presents an issue of liability common to the class. Blyth's course of conduct and practice of using deceptive confirmation slips (R 10) in violation of clause (3) of the Rule also presents an issue of liability common to all class members.

The Ninth Circuit's refusal to correct the District Court's denial of class action made for an inappropriate reason is

directly contrary to the Tenth Circuit's action in Esplin v. Hirschi, 402 F.2d 94, (1968) cert. denied, 394 U.S. 928. Where, as in the present case, a District Court had misinterpreted the basis of the plaintiffs' cause, the Tenth Circuit did not hesitate to correct the error and allow class treatment of an action founded on omissions which were the same as to all members of the class. See also Gold Strike Stamp Company v. Christensen, 436 F.2d 791, 793. (10th Cir. 1970).

IN SELECTING FROM A STATE STATUTE THE TIME PERIOD FOR LIMITATIONS IN A RULE 10b-5 CASE, THE STATUTE MOST SIMILAR TO THE FEDERAL CAUSE OF ACTION SHOULD BE CHOSEN.

Finally, there is conflict in applying the resemblance test when selecting state statutes of limitation to serve federal policy of securities law enforcement. As a matter of federal policy, to effectuate the remedial purpose of the securities acts, the courts seek to apply the state limitations statute which most clearly resembles the federal cause and has the longest limitation period. United California Bank v. Salik, 481 F.2d 1012 (9th Cir. 1973). Yet the courts below selected the two year common law fraud statute instead of the three-year Oregon blue sky statute. The Oregon blue sky statute not only resembles but is identical in language to Rule 10 b-5. Compare Rule 10b-5 (A-14) with this Oregon Statute (A-21) ORS 59.115(5), 59.135.

In Vanderboom v. Sexton, 422 F.2d 1233 (1970) the Eighth Circuit selected the Arkansas two-year blue sky statute over a general three year statute applicable to fraud. The court held that since the circuit did not require proof of scienter under Section 10(b), as is required in

common law fraud, the action was a "blue sky type of implied statutory action: and not a "basic fraud action" pages 1238-1239. The court applied the federal tolling doctrine when ruling that the period ran two years from discovery rather than two years from sale, as provided in the blue sky statute adopted. p. 1240.

The Seventh Circuit has agreed with the Eighth Circuit's ruling in Vanderboom. Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972).

The position of the Seventh and Eighth Circuits has been specifically rejected in the Ninth and Tenth Circuits. In Douglass v. Glenn E. Hinton Investments, Inc., 440 F.2d 912 (9th Cir. 1971), the Ninth Circuit rejected a newly enacted Washington blue sky statute on the ground that the period of limitations in the statute ran only from the date of sale, whereas no previous ruling existed in which the limitation period applicable to section 10(b) began before discovery.

In contrast, the Tenth Circuit in Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971) merely distinguished Vanderboom on the ground that the Tenth Circuit had not abrogated scienter under section 10(b) as had the Eighth.

In addition to the Ninth and Tenth, three other circuits, the First, Second and Sixth, appear to continue to apply the limitations period applicable to fraud.

In Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965) the First Circuit applied the two-year Massachusetts fraud statute without discussion of the two-year blue sky statute, and in Collins v. Rukin, 342 F. Supp. 1282 (D. Mass. 1972) the District Court found it unnecessary to choose between the two. However, in the same Circuit, another District Court selected the two-year Maine blue sky statute in preference to the six-year general statute for civil action without mention of possible conflict with Janigan. Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890 (D. Maine 1971).

Nor has the Second Circuit considered the blue sky statute of limitations. New York has no period of limitations expressly applicable to misrepresentations in the sale of securities.

In the Fifth Circuit, the Court of Appeals has declined several times to choose between the statute of limitations applicable to fraud and the blue sky statute. Wolf v. Frank, 477 F.2d 467 (5th Cir. 1972); Bailes v. Colonial Press, Inc., 444 F.2d 1241 (5th Cir. 1971); Aboussie v. Aboussie, 441 F.2d 150 (5th Cir. 1971). As a result, three District Court cases in the Circuit have applied the fraud statute: Beefy Trail, Inc. v. Beefy King Int'l Inc., 348 F. Supp. 799 (M.D. Fla. 1972); Sargent v. Genesco, Inc., 352 F. Supp 66 (M.D. Fla.) aff'd per curiam 458 F.2d 9 (5th Cir. 1972); Weiser v. Schwartz, 286 F.Supp. 389 (E.D. La. 1968).

Three other District Court cases in the same circuit have applied the blue sky statute: Josef's v.Southern Inv. Co., 349 F.Supp. 1099; (S. D. Fla 1972); Richardson v. Salinas, 336 F. Supp 997 (N.D. Tex. 1972); Carpenter v. Hall, 311 F. Supp. 1099 (S. D. TEx. 1970).

The remaining three Courts of Appeal have not addressed the question. In the Fourth Circuit, the Districts are split between the two choices: Corey v. Bache & Co., CCH Fed. Sec. L. Rep. Par 94,012 (S.D. W.Va. 1973) applied the two-year Indiana blue sky staute, while Batchelor v. Legg & Co., 52 F.R.D. 553 (D. Md. 1971) applied the two-year Maryland blue sky statute. In contrast, Johns Hopkins University v. Hutton, 343 F. Supp 245 (D. Md. 1972) and Baumel v. Rose, 283 F. Supp. 128 (D. Md. 1968) applied the three-year Maryland general tort statute. In Stevens v. Abbot, Proctor & Paine, 288 F. Supp. 836 (E.D. Va. 1968) the five-year Virginia statute on frauds was applied without direct consideration of the two-year blue sky statute.

In the Third Circuit, the question has not been directly considered. See, Livingston v. Weis, Voisin, Cannon, Inc., 294 F. Supp. 676 (D. N.J. 1968); Lorenz v. Watson, 258 F. Supp. 724 (E.D. Pa. 1966); Tobacco & Allied Stocks, Inc., v. Transamerica Corp., 142 F. Supp. 323 (D. Del. 1956) aff'd 244 F.2d 902 (3rd Cir. 1957. We have found no reported decisions at all in the D. G. circuit.

Winkelman and Becker filed their action June 13, 1972 (R.1), well within three years from the June 12, 1969 letter. This class action tolled the running of the statute of limitations as to the individuals in Anderson, who filed March 8, 1973. (R. 134). The time for filing Anderson was tolled under the doctrine of Escott v. Bar Chris Construction Corp., 340 F.2d 731 (2d Cir.

1965); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). Therefore, under either a two-year or a three-year limitation period, whichever would be appropriate, plaintiffs filed their causes timely under the Federal Equitable Tolling doctrine.

Your petitioners pray that this Honorable Court may deem this case to be of sufficient importance to make appropriate the granting of a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Counsel for the petitioners.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WALTER E. WINKELMAN and PAUL F. BECKER,
Plaintiffs-Appellants,

vs.

BLYTH & CO., INC., a Delaware corporation,
Defendant-Respondent.

ELMER G. ANDERSON and VICTORIA G. ANDERSON, husband and wife, THELMA SCOTT WOOD, MAURICE J. SCOTT and MARGARET M. SCOTT, husband and wife, ABBOTT W. LAWRENCE and EDITH R. LAWRENCE, husband and wife,
Plaintiffs-Appellants,

vs.

BLYTH EASTMAN DILLON & CO., (Blyth & Co., Inc.), a Delaware corporation, THOMAS MORRIS and JOHN VAN LANINGHAM,
Defendants-Respondents.

No. 74-1203

OPINION

[June 10, 1975]

Appeal from the United States District Court
for the District of Oregon

Before: KOELSCH and ELY, Circuit Judges, and
VOORHEES,* District Judge.

KOELSCH, Circuit Judge:

In these actions for violations of the federal securities laws and for common law fraud, the District Court for the District of Oregon (1) ruled that Oregon's two-year statute of limitations, Ore. Rev. Stat. §12.110(1), and not the State's six-year statute, Ore.

*The Honorable Donald S. Voorhees, United States District Judge for the Western District of Washington, sitting by designation.

Rev. Stat. §12.080, was applicable to the federal and common law claims; (2) concluded as a matter of law that the alleged fraud or deceit upon which the actions were based had been discovered by plaintiffs more than two years before the actions were filed; and hence (3) granted the summary judgments in favor of defendants from which this appeal is taken. We affirm based on the well reasoned opinion of the court below, ... F. Supp. ..... (D. Ore. Aug. 31, 1973).

On appeal plaintiffs vigorously argue that summary judgment was improper because it cannot be said as a matter of law that the statute of limitations ran as to the defendants' alleged failure to disclose they were market makers and the extent to which they were financially interested in the consummation of the stock sales. We disagree. As recognized in *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970), the significance of such nondisclosures arises from their probable impact on an investor's assessment of the broker's representations regarding the worth of the stock and of his recommendation to buy or sell.[1] Here, the

[1]In *Chasins* the Second Circuit said at 1172:

"Knowledge of the additional fact of market making by Smith, Barney in the three securities recommended could well influence the decision of a client in Chasins' position, depending on the broker-dealer's undertaking to analyze and advise, whether to follow its recommendation to buy the securities; disclosure of the fact would indicate the possibility of adverse interests which might be reflected in Smith, Barney's recommendations. Smith, Barney could well be caught in either a 'short' position or a 'long' position in a security, because of erroneous judgment of supply and demand at given levels. If over supplied, it may be to the interest of a market maker to attempt to unload the securities on his retail clients. Here, Smith, Barney's strong recommendations of the three securities Chasins purchased could have been motivated by its own market position rather than the intrinsic desirability of the securities for Chasins. An investor who is at least informed of the possibility of such adverse interests, due to his broker's market making in the securities recommended, can question the reasons for the recommendations. The investor, such as Chasins, must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 at 196, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963)."

See also Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-154 (1972), and cases cited therein.

statute of limitations began to run when plaintiffs discovered the falsity of defendants' representations as to the worth of the stock, and thus the unreliability of defendants' initial recommendation to purchase; under the circumstances, that discovery gave plaintiffs sufficient notice that they had been defrauded or deceived to commence the running of the statute as to the actions in their entirety. The mere fact that plaintiffs had not then discovered defendants' alleged undisclosed interests did not toll the statute, nor did plaintiffs' subsequent discovery of the alleged omissions commence its running anew.

AFFIRMED.

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U. S. DISTRICT COURT
DISTRICT OF OREGON
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ROBERT M. CHRIST, Clerk
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Opinion

A-4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WALTER E. WINKELMAN and PAUL F. BECKER,

Plaintiffs,

vs.

BLYTH & CO., INC., a Delaware corporation,

Defendant.

Civil No. 72-474

OPINION & ORDER

ELMER G. ANDERSON and VICTORIA G. ANDERSON, husband and wife, THELMA SCOTT WOOD, MAURICE J. SCOTT and MARGARET M. SCOTT, husband and wife, ABBOTT W. LAWRENCE and EDITH R. LAWRENCE, husband and wife,

Plaintiffs,

vs.

BLYTH EASTMAN DILLON & CO., (BLYTH & CO., INC.), a Delaware corporation, THOMAS MORRIS and JOHN VAN LANINGHAM,

Defendants.

Civil No. 73-185

Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56. The defendants allege that the plaintiffs' actions are barred. ORS 59.115(5) and 12.110(1).

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R 303

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Defendant Blyth, Eastman, Dillon & Co. is a broker-dealer. Thomas Moore, a security salesman and vice president of the corporation, and John Van Laningham, a security salesman of the corporation, are also named as defendants.

In Anderson, filed March 8, 1973, plaintiffs contend that defendants sold them shares of Aseco, Inc., between June 25, 1968, and March 5, 1969, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5, § 17(a) of the Securities Act of 1933, and ORS 59.135.

In Winkelman, filed June 13, 1972, plaintiffs contend that defendants sold them shares of Aseco, Inc., between November 18, 1968, and December 26, 1968, in violation of § 17(a) of the Securities Act of 1933, Rule 10b-5, and § 10(b) of the Securities Exchange Act of 1934.

The cases were consolidated for pretrial.

The purchases of stock by the plaintiffs occurred independently of each other. Each allege that the defendants misrepresented the financial and operating condition of Aseco in stating:

1) Aseco was a sound investment grade security and a viable, going company with a good outlook for the future.

2) Aseco shares would rise in price within a short time.

3) Aseco was to merge in the near future with Whale, Inc., thus increasing the value of the shares.

Plaintiffs contend that Blyth, in an attempt to induce plaintiffs to buy Aseco, made these representations without a factual basis for making the predictions and without investigating Aseco.

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On June 12, 1969, Aseco sent a letter to shareholders which set out numerous adverse factors about the company. The letter revealed that:

1) The proposed merger with Whale, Inc. would not be consummated.

2) The company had lost contracts with the federal government and International Harvester. The contracts had produced 100% of reported income for the year ending February 28, 1969.

3) Four of the five Aseco plants were idle, with sales of equipment and facilities contemplated.

4) The company had been unable to locate new business for its plants.

5) A $700,000 note was due on June 16, 1969. The company was conferring with the bank for a renewal of the note and conversion of an indebtedness of $900,000 into a long-term obligation.

6) Former directors and officers had filed legal action against the company.

7) Recent changes of officers and directors.

8) Book value of the stock was about $5.00 per share.

9) Current operating losses would continue unless new business was found.

At the time of the June 12, 1969, letter, each of the plaintiffs were stockholders of Aseco. The 1969 annual report to shareholders, the notice of annual meeting and proxy statements issued on August 1, 1969, confirmed the disasterous condition of the company.

The latest sale in Anderson occurred on March 5, 1969. ORS 59.115(5) provides that no action or suit under the Oregon Securities Law may be commenced by a purchaser

more than three years after the sale. The complaint in Anderson was filed on March 8, 1973, more than four years after the last sale. The claim brought under ORS 59.135 is barred by the statute of limitations.

There is no federal statute of limitations applicable to the remaining claims. It is now clear that the Oregon statute of limitations under ORS 12.110(1) is to be applied. The two-year period is subject to the proviso that the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

"Discovery" as used in ORS 12.110(1) means "from the time the fraud was known or could have been discovered through the exercise of reasonable care." Salem Sand & Gravel Company v. City of Salem, 260 OR. 630, 492 P.2d 271, 275 (1971).

In Hoffert v. E. S. Hinkle & Co., Inc., 56 F.R.D. 395 (D. Or. 1972), Judge Burns clearly stated the rule:

> "I conclude that in SEC Rule 10b-5 cases in Oregon, the proper statute of limitation to apply is the two-year period of ORS 12.110. I further conclude, as a matter of federal law, that the claim accrues and the period of limitation starts to run either upon actual discovery of the fraud, or at such time as a reasonably prudent person, similarly situated, should have discovered the fraud." 56 F.R.D. at 400.

A similar standard was enunciated by the court in Turner v. Lundquist, 377 F.2d 44 (9th Cir. 1967), when it affirmed a summary judgment for the defendant under the California three-year statute. The statute of limitations is a bar both to claims brought under Rule 10b-5 and Section 17(a) of the 1933 Act.

The court in Turner reaffirmed the rule applicable to this situation:

/

> ". . . when knowledge had by or imputed to plaintiff is such as to compel the conclusion that a prudent man would have suspected the fraud, the court may determine as a matter of law that there had been 'discovery'." 377 F.2d at 47.

The knowledge had by or imputed to the plaintiffs from the June 12, 1969, letter to the stockholders compels the conclusion that a prudent man would have suspected the alleged fraud. There is no genuine issue as to this material fact.

I conclude that plaintiffs had two years from June 12, 1969, in which to file their claims under Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5, Section 17(a) of the Securities Act of 1933, and common law fraud. They had three years after the last sale complained of in which to file their claims under ORS 59.135. Accordingly, it is

ORDERED that defendants' motion for summary judgment is GRANTED.

DATED this 31st day of August, 1973.

United States District Judge

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U. S. DISTRICT COURT
DISTRICT OF OREGON
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OCT 24 1973

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A-9

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES BREEDLOVE and MARIAN BREEDLOVE,	)	
Plaintiffs,	)	Civil No. 72-247
vs.	)	ORDER
BLYTH & CO., INC., a Delaware corporation,	)	
Defendant.	)	

Blyth & Co. has filed a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56. The motion is based on the three-year statute of limitations of ORS 59.115(5) for claims asserted under the Oregon securities laws and the two-year statute of limitations of ORS 12.110 for claims asserted under the Securities Exchange Act of 1934.

The complaint was filed on March 28, 1972. Plaintiffs agree that claims on purchases made prior to March 28, 1969, are barred by ORS 59.115(5).

As to the remaining claims under the federal securities laws, the two-year statute of limitations of ORS 12.110 starts to run "either upon actual discovery of the fraud, or at such time as a reasonably prudent person, similarly situated, should have discovered the fraud." Hoffert v. Hinkle, 59 F.R.D. 395, 400 (D. Or. 1972).

On June 5, 1969, plaintiff James Breedlove purchased 100 shares of Aseco, Inc. stock. The transaction was effected by Blyth & Co. On June 12, 1969, the board of directors of Aseco sent to its shareholders a letter which set forth facts regarding the financial condition of the company and the various problems the company was presently experiencing. In the deposition of James Breedlove which was taken for purposes of this case, he acknowledged that he had received and read the letter and that the letter revealed to him that Aseco was in trouble.

As to James Breedlove's contentions that the defendant made misstatements of fact or omitted to state material facts with respect to his purchase of Aseco stock, it is clear that as of June 12, 1969, James Breedlove discovered, or as a reasonably prudent person should have discovered, the facts contained in the letter.

The defendant has failed to provide sufficient evidence for this Court to reach the conclusion that, as a matter of law, the plaintiffs discovered more than two years prior to the filing of their complaint the fraud they contend existed as to the remaining purchases of stock from the defendant. Accordingly, it is

ORDERED:

I. Defendant's motion is GRANTED as to:

A. The claims under ORS Chapter 59 for all purchases which were made prior to March 28, 1969, which are barred by the three-year statute of limitations of ORS 59.115(5).

B. The claims of James Breedlove under the Securities Exchange Act of 1934, for his June 5, 1969, purchase of Aseco, Inc. stock are barred by the two-year statute

of limitations of ORS 12.110 as to those facts which he had discovered from the June 12, 1969, letter to shareholders. This bar would operate to prevent James Breedlove from offering at trial:

1) statements which he alleges were untrue statements of material fact made by the defendant with respect to Aseco:

(a) that Aseco would merge with Whale and that the merger would result in substantially higher prices for Aseco stock [PTO, page 5, lines 29-31];

(b) that the earnings of Aseco would show substantial improvement over prior years [PTO, page 5, line 32, to page 6, line 1];

(c) that Aseco had a number of government contracts, and would be awarded valuable government contracts in the future [PTO, page 6, lines 2-4]; and

(d) that Aseco was acquiring a plastics division which would substantially increase its earnings and the value of its stock [PTO, page 6, lines 5-7].

2) omissions of material facts by the defendant with respect to Aseco:

(a) that Aseco's principal customer had canceled all future orders, and that no replacement business had been obtained nor was there any reasonable probability of replacement business [PTO, page 7, lines 31-32 to page 8, lines 1-2];

(b) that numerous significant lawsuits had been filed against Aseco [PTO, page 8, lines 8-9];

(c) that Aseco had lost numerous significant government contracts and had been unsuccessful in obtaining new or supplemental contracts [PTO, page 8, lines 10-12]; and

(d) that Aseco was acquiring a plastics division which would require substantial amounts of capital, without any business prospects [PTO, page 8, lines 16-18].

II. Defendant's motion as to all other purchases is DENIED.

DATED this 24th day of October, 1973.

United States District Judge

4 - ORDER

U. S. DISTRICT COURT
DISTRICT OF OREGON
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ROBERT M. CHRIST, Clerk
By DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WALTER E. WINKLEMAN and PAUL F. BECKER, individually and as representatives of persons similarly situated, Plaintiffs, vs. BLYTH & CO., INC., a Delaware corporation, Defendant.	Civil No. 72-474 ORDER

The motion by the plaintiffs presently before the Court in this case is that there issue an order determining that the action is maintainable as a class action under Fed. R. Civ. P. 23.

It appears that, in this action, a class action is not superior to other available methods for fair and efficient adjudication in that there appear to be non-standard oral misrepresentations that form the basis of the alleged fraud, and common questions of law and fact do not predominate.

IT IS ORDERED that the Motion for an Order Determining that the Action is Maintainable as a Class Action under Rule 23 is DENIED.

DATED this 21st day of December, 1972.

United States District Judge

SECURITIES AND EXCHANGE ACT OF 1934

Regulation of the Use of Manipulative and Deceptive Devices

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b–5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

OREGON REVISED STATUTES

LIMITATIONS OF ACTIONS AND SUITS

12.010 Time of commencing actions; objection by answer. Actions at law shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited shall only be taken by answer, except as provided in ORS 16.260.

12.110 Within two years; determination of period in action for fraud or deceit; injuries to person from professional malpractice. (1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the pre-

sentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by

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affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

59.135 Fraud and deceit with respect to securities or securities business. It is unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security or the conduct of a securities business or for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:

(1) To employ any device, scheme or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or

(4) To make or file, or cause to be made or filed, to or with the commissioner any statement, report or document which is known to be false in any material respect or matter.

[1967 c.537 §14]

59.115 Liability of person offering or selling securities unlawfully; limitations on proceeding.

(5) No action or suit may be commenced under this section more than three years after the sale.

ASECO, INCORPORATED
40399 Grand River
Novi, Michigan 48050

To the Shareholders of
Aseco, Incorporated:

In November, 1968, the Company announced that it had reached an agreement in principle with Whale, Inc., Nashville, Tennessee, to merge with Whale, on the basis of exchanging two shares of Whale Common Stock for one share of ASECO Common Stock. The Board of Directors was of the opinion that the merger was in the best interests of the Company. In February, 1969, the Board agreed to a revision of the merger terms under which the exchange ratio was reduced to 1.6 Whale shares for one ASECO share. The Board believed that this was a fair adjustment since certain government contracts undertaken by the Company had been completed and there was no immediate replacement business. The Board believed that the merger, on the adjusted exchange rate, was desirable and that the merger was in the best interests of ASECO and its shareholders.

On May 20, 1969, the Company learned that Whale's Board of Directors had decided not to proceed with the merger. Consummation of the merger was, of course, subject to several conditions, one of which was approval of the merger by a majority of the shareholders of Whale. It is unlikely that the Whale shareholders would approve the merger if its own Board of Directors did not actively support it. As a practical matter, the Company was compelled to recognize that the merger would not be consummated.

The purpose of this letter is to summarize briefly recent developments affecting the Company's business. This information had been prepared for the proxy statement to be sent to you in connection with the Whale merger, which we thought would have been completed by this time. Financial statements for 1969 will be sent to you shortly.

1969 Financial Statements

Total consolidated sales for the year ended February 28, 1969 were approximately $14,670,000 compared with $8,181,000 for the year ended February 29, 1968, and net earnings were approximately $14,670,000 compared with $8,181,000 for the year ended February 29, 1968, and net earnings were approximately $410,000 compared with $140,575 for the prior year. Earnings per share for the two years were approximately $1.70 and $0.59, respectively. Sales and earnings for the year ended February 28, 1969 include the operations of Deco Corporation since August 26, 1968, the date of its acquisition by the Company. Earnings for 1969 have been reduced by substantial charges to reflect the reduction in value of certain assets resulting from the present state of the Company's business as subsequently described in this letter.

Of the $14,670,000 of total consolidated sales of the Company for the year ended February 28, 1969, approximately 84% was attributable to government work, almost all of which was pursuant to contracts completed during the Company's last fiscal year. The Company has not been successful in obtaining new government work, although efforts to do so are continuing.

In November, 1968, Case-Master Body, Inc., a subsidiary of the Company, completed a contract of

approximately $6,960,000 at its Rose City, Michigan plant for the production of U.S. Army M-149 and M-625 1½ ton 400-gallon portable water trailers for the United States Government. The plant is not currently in use, and it is contemplated that it will be sold unless new work is obtained. In January, 1969, Case-Master completed a contract of approximately $8,840,000 with the United States Government for the manufacture of the United States Army M-101 3/4 ton utility trailer. This spring Case-Master completed production under a sub-contract of approximately $300,000 for the manufacture of chassises for a modified version of the U.S. Army M-101A 3/4 ton utility cargo trailer for a commercial customer. All of this work was performed at Case-Master's Holland, Michigan plant. At the present time this plant is not in use except for completion of deliveries under the sub-contract. Case-Master's lease on this plant expires July 15, 1969.

The Company reviews government and commercial bidding opportunities on a routine basis and submits bids on work within its productive capacity. Notwithstanding these procedures, the Company has been unable to locate new business for its plants.

For more than 20 years, the Company's Chelsea Manufacturing Division assembled and spotwelded components of cab bodies for International Harvester Company. Late in 1968 International Harvester commenced doing this work in its own plant. The Company is seeking additional work for this plant at this time. Work for

International Harvester constituted 16% of the Company's consolidated sales for the year ended February 28, 1969. The Chelsea plant is not currently in use, and it is contemplated that it also will be sold unless new work is obtained.

New Business

In August, 1968, the Company acquired all of the outstanding stock of Deco Corporation, for a total purchase price of $1,800,000. Deco is located in Warren, Michigan, and is engaged in the precision boring business. This Company machines customer furnished material, which mainly consists of large steel castings and forgings. The purchase price was approximately equal to the fair market value of Deco's real estate, machinery and net current assets. Sales of this subsidiary are running at a rate considerably less than prior years and it is presently operating at a loss.

The newest Division of the Company is the Trans-Plastics Division located in Conneaut, Ohio. This Division has been organized to produce and sell reinforced plastic products for the automobile, transportation, electronics, aircraft and other industries. Construction of a 20,000 square-foot one-story steel building is nearing completion. It is anticipated that the plant will be ready for the commencement of production by approximately July 15, 1969. At this time the Company does not have any orders for the Trans-Plastics Division but sales efforts are under way.

Bank Debt

On March 18, 1969 the Company borrowed $700,000 from Bank of the Commonwealth, Detroit, Michigan, on an 8½% 90-day note. On May 15, 1969 the Company borrowed an additional $200,000 from the Bank on an 8½% 60-day note to provide additional working capital. The Company granted the Bank a security interest in the machinery, equipment, furniture and fixtures, owned as of March 18, 1969 or thereafter acquired, of the Company and its subsidiaries, excluding the Trans-Plastics Division, as security for these loans. Proceeds of the $700,000 note were used primarily to retire short-term indebtedness of approximately $650,000 to Michigan National Bank, Port Huron, Michigan. The $700,000 note is due June 16, 1969. The Company is conferring with the Bank for a renewal of this note and conversion of all or a portion of the total indebtedness of $900,000 into long-term indebtedness.

Litigation and Claims

The Company is a defendant in a law suit filed in December, 1968 in the Circuit Court for the County of Oakland, Michigan, by Rudolph J. Schuler, Edward Laske and Robert J. Templin, all of whom are former directors of the Company. Plaintiffs claim that the Company failed to issue 500 shares of its Common Stock to each of them pursuant to an alleged oral agreement under which they guaranteed payment of a bank loan made to the Company in 1964. Plaintiffs' claim is for 4,950 shares (as adjusted for a 10% stock dividend in 1967 and a 3-for-1 stock split in 1968) or in the alternative

$45,000. The Company and Case-Master Body, Inc. are defendants in the action in which the plaintiffs claim that truck bodies built by Case-Master were defective. Plaintiffs claim approximately $25,000 in damages.

In July, 1968, the Company leased 8,500 square-feet of office space in Bay City, Michigan, from Wenonah, Inc., a corporation controlled by John A. Rapanos, then Chairman of the Board of Directors of the Company and a principal stockholder of the Company, for a ten-year term expiring in August, 1978 at an annual rental of approximately $29,000. This facility has never been used by the Company, which has cancelled the lease as of March 31, 1969. There is no provision in the lease for such cancellation. Recently Wenonah, Inc. filed suit against the Company for its failure to make payments under the lease. The Company is asserting that the lease is voidable under Michigan law because of Mr. Rapanos' interests in the Company and Wenonah, Inc. at the time the lease was executed.

A claim has been asserted against the Company by Robert E. Voigt, a former President of the Company, for a finder's fee of $36,000 in connection with the acquisition of Deco Corporation. Management considers this claim to be without merit.

Changes in Management

On October 4, 1968, John A. Rapanos and Frank J. McCabe resigned from the Board of Directors. Albert E. Hill, President of Whale, Inc. and a partner in Chelsea Associates, which owns approximately 20% of the Company's outstanding stock, and Hugh G. Pike, of Hinton Jones & Co., investment

bankers, Seattle, Washington, were elected to succeed them. In December, 1968, Bert Cremers resigned from the Board for personal reasons. In January, 1969, Walter L. Cislo was elected to fill the vacancy created by Mr. Cremer's resignation. On January 15, 1969, Jack H. deKruif resigned as President of the Company and John E. McDonald, then Vice President-Finance, was elected President on an interim basis. On May 22, 1969, the Board elected Henry W. Hooker to the Board. Mr. Hooker is Vice-Chairman of the Board of Performance Systems, Inc. (formerly Minnie Pearl's Chicken System, Inc.) and is a partner in Chelsea Associates.

Current Operations and Future Prospects

At present the Company's principal business is that carried on by Deco Corporation. The Company's inability to obtain new government business coupled with the phasing out of its International Harvester business has resulted in operating losses. Losses will continue unless new business is acquired. These factors plus the purchase of Deco Corporation and the start-up costs of the Trans-Plastics Division have contributed to a current working capital deficit of the Company of approximately $900,000.

To continue in business and to cover start-up costs for the Trans-Plastics Division, substantial additional financing is required. At a meeting on June 3, 1969, the Board concluded that the financial condition of the Company precluded normal bank financing and took the initial action required to raise between $700,000 and $1,000,000 from a limited number of private investors. While final terms of

the proposed financing have not been negotiated, preliminary indications are that the required funds must be raised by sale of notes convertible into Common Stock at approximately book value, which is now about $5.00 per share. At the same time, the Board considered the employment of additional executive personnel and intensified its efforts to obtain new government contracts. Hopefully, the Board will be in a position to give the shareholders a more positive report within the next few weeks.

Very truly yours,

John E. McDonald,
Interim President
For the Board
of Directors